No. 12,592

IN THE

United States Court of Appeals

For the Ninth Circuit

LAWRENCE A. WHITE and ERMA R. WHITE,

Appellants,

vs.

CLARA M. EAGLESON,

Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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I.

STATEMENT RELATING TO PLEADING AND JURISDICTION.

This is an appeal from a final judgment rendered by the District Court for the Territory of Alaska, Third Division, on February 27, 1950. The judgment was in the amount of Thirty-five Hundred Dollars ($3500.00), plus interest, costs, disbursements, and attorney's fees in favor of the plaintiff, appellee herein, and against defendants, appellants herein (R. 40-41).

The District Court for the Territory of Alaska is a court of general jurisdiction consisting of four divisions, of which the Third Division is one.

Jurisdiction of the District Court in the matter is conferred by Title 48 U.S.C., Sec. 101. See also Alaska Compiled Laws Annotated, 1949, 53-1-1.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28 U.S. C., Sections 1291 and 1294.

Practice in the District Court until July 18, 1949, was controlled by A.C.L.A., 1949. Under date of July 18, 1949, the Federal Rules of Civil Procedure were extended to the District Courts for Alaska and such rules have governed the practice of those courts since that time. 63 Stat. 445, 48 U.S.C. 103a.

This action was commenced by the filing of plaintiff's complaint on May 6, 1949 (R. 7). The complaint in brief alleged that plaintiff at all times mentioned was a licensed real estate broker, that defendants employed plaintiff to procure a purchaser for a certain business on a ten per cent (10%) commission of the selling price, that the employment agreement was extended to April 30, 1949, that plaintiff was instrumental in "procuring one John Doe Pinkering to purchase the property," that the sale was made for $35,-000, that by such sale plaintiff became entitled to a commission of $3,500 which has not been paid (R. 3-5). As originally filed, the complaint alleged the sale price at $45,000, the commission at $4,500, and that the sale was made in March, 1949. These allegations were changed upon plaintiff's motion to amend

made during the trial to read as they are in the record (R. 15-16, 160, 166). A copy of the "authorization to sell" which is the basis of the action, was attached to the complaint, marked Exhibit "A" (R. 5-7) (This is the same as plaintiff's Exhibit I. R. 66-68).

Defendants filed separate answers. Both admitted that plaintiff was a real estate broker, that she was employed to procure a purchaser for the property, and that the commission was to be ten per cent (10%) upon the selling price. Both defendants denied that plaintiff was instrumental in procuring the sale or that any commission became due to plaintiff. Defendant Lawrence White alleged that the employment agreement was not extended for or on behalf of Erma White, and Erma White alleged that the agreement had expired as to her in September of 1948. Both defendants admitted that defendants had paid no money to plaintiff. Both defendants affirmatively alleged that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property, that the purchase was consummated by direct negotiation between the seller and buyer after expiration of the authorization and without any effort on behalf of plaintiff therein (R. 7-12). The answers were filed on June 16, 1949.

No motions were directed to the answers and no reply was filed.

With the exception of the amendments to the complaint above noted, no amendments to the pleadings were asked or granted and the matter was tried on the issues framed by the complaint and the answers.

II.

STATEMENT OF THE CASE.

In the month of July, 1948, Clara M. Eagleson, plaintiff and appellee, was engaged in the real estate business at Anchorage, Alaska, and was a regularly licensed real estate broker (Admissions in Answers, R. 7, 10). At that time Carl T. Rentschler was working with appellee as her agent (R. 63, 77). At the same time defendants Lawrence A. White and Erma R. White were husband and wife and the owners of a certain business conducted in Anchorage and known as the L. W. Chocolate Shop.

In July of 1948 Mr. Rentschler had certain discussions with Mr. White which resulted in the signing by Mr. and Mrs. White, on July 7, 1948, of an authorization for the Eagleson Agency to sell such business (R. 64). That authorization to sell is the basis of this action and a copy of it is attached to plaintiff's complaint, marked Exhibit "A" (R. 5-7) and the original of it is in evidence at plaintiff's Exhibit 1 (R. 66-68). Execution of the document by defendants is admitted in the answers.

Rentschler handled the entire negotiations leading up to the signing of the authorization to sell above mentioned (R. 77). Acting as agent for Mrs. Eagleson, he wrote the document and prepared it (R. 75, 77).

The authorization expired by its own terms on September 8, 1948. On or about April 8, 1949, Mr. Rentschler contacted White and informed White that he had several interested parties to buy the property

and would like a contract extension (R. 69, 79, 80) and Mr. White granted an extension to April 30, 1949 (R. 80, 81). At that time Mr. White signed his initials to the original authorization after the words "Extension until 4/30/49" as will appear from the original document (R. 68).

No one from the Eagleson Agency ever at any time procured a prospect who made any offer to purchase the business (R. 80, 84, 146, 147, 153, 158, 161, 184). The agency was unable to arrange any sale (R. 81). The closest the agency ever came to making a sale was in negotiating with a Mr. Urand, who refused to pay the asking price of $45,000 and said he would not even pay $40,000, and in fact refused to make any offer at all. This party reportedly had available the sum of $4,000 as a down payment and apparently asked Mrs. Eagleson to get White to make an offer (R. 150, 151, 152, 153, 166). White refused to make an offer to Urand because the down payment of $4,000 available was too small (R. 166).

About March 10, 1949, Herbert E. Pickering came down from Fairbanks and worked in the Chocolate Shop under an arrangement where he would trade services in exchange for learning the candy business and that arrangement continued until Pickering purchased the subject business on May 1, 1949 (R. 168, 169). Sometime in April, 1949, and between April 1 and April 15, Pickering discussed with White the possibility of purchasing the property (R. 171). He knew the place was for sale and knew it was listed with an agency but not what agency (R. 169, 176).

Pickering testified that on one occasion he saw Rentschler bring in a prospect. He didn't know the man's name but he was a tall man. Pickering was busy making candy and knows nothing of the conversation or of what took place. This was prior to Easter, 1949 (R. 169, 170) (Reference to the calendar shows that Easter in 1949 was on April 17).

Pickering preferred to deal with White directly and saw no need for dealing with a real estate agency (R. 179).

Shortly after Pickering first discussed with White the purchase of the property, the parties came to an agreement as to price and as to terms of payment. The only price discussed was $35,000 and there was no haggling over price (R. 172). The discussions between Mr. White and Mr. Pickering were made with the specific understanding that the real estate agency had first right to sell the property through April 30th, and that if it consummated a sale prior to that time Pickering would not be entitled to buy.

The agreement between White and Pickering as to price and as to terms was made contingent upon a prior sale not being made by the real estate agency. Any agreement between White and Pickering was likewise made subject to Pickering's being able to raise the down payment of $6,000 by May 1 (R. 171, 172, 173, 174, 175, 176, 179, 198). Pickering wanted the business, but it was his understanding that he couldn't purchase it if the agency produced a buyer prior to May 1, and Pickering had made other plans

in the event someone else bought the place (R. 179, 180). Mr. Pickering was not able to liquidate his assets completely prior to May 1 and actually raised the last $1,000 of the down payment on the afternoon of that date (R. 175).

The agency failed to procure a buyer prior to May 1, the balance of Pickering's funds necessary to make the down payment came through on May 1, and the parties executed the contract of sale on May 1 (R. 169, 178-180). The contract was acknowledged on May 2, 1949, before a notary and a copy of such agreement is in evidence as plaintiff's Exhibit 2 (R. 113-122).

White himself told Mrs. Eagleson of Mr. Pickering and that Pickering was interested in purchasing the property (R. 141, 153, 154, 183, 198). Mr. Rentschler also was advised that Pickering was interested in purchasing the property and he believes he had such knowledge as early as April 8 or about that date (R. 80).

Neither Rentschler nor Mrs. Eagleson nor anyone else connected with the Eagleson agency ever had any dealings with Pickering. He didn't know any of them (R. 169). None of them had any conversation with him or attempted to contact him (R. 80, 153).

Mr. Rentschler and Mrs. Eagleson maintain that they didn't contact Pickering because White told them not to as Pickering had an aversion to real estate agents (R. 71, 73, 80, 141, 153). White testified that he did not tell them or either of them not to contact

Pickering (R. 200, 201). White testified that he told Mrs. Eagleson that Pickering wouldn't come to see her and do business with a real estate agency because he couldn't afford to pay that much money, but that he, White, was perfectly willing that Mrs. Eagleson should attempt to deal with Pickering if Pickering would go to her (R. 200, 201).

Apparently sometime in the month of April Rentschler and Mrs. Eagleson heard some rumors that White had sold the business and both claim to have talked to White about it.

Rentschler said his first conversation with White on that subject was about April 20 and Rentschler asked White if he had sold the business. White said "No," and Rentschler claims he asked White to contact Mrs. Eagleson (R. 90, 96). He claims to have had a second conversation with White about the claimed sale somewhere about April 30, 1949, and upon cross-examination fixed the time as between April 25 and May 4 (R. 92). He fixes the time as being the day before White left Anchorage (R. 91, 94), and as the day before White was served with Summons in this action (R. 91).

White acknowledged the agreement with Pickering at Anchorage on May 2, 1949, and was personally served with Summons in this action at Anchorage sometime subsequent to the filing of the complaint, which took place on May 6, 1949.

In that second conversation, Rentschler claims that he told White that he, Rentschler, understood the

business had been sold and suggested White should go to the office and "square up on the commission," and that White said "No." Then he claims to have told White, "You realize you are obligated to, don't you?" and White said "No" (R. 94, 95, 96).

Mrs. Eagleson claims that White contacted her about April 23 and she told him she heard the business had been sold. White denied it (R. 140). At that time, apparently, White told her about Pickering. She says that White told her Pickering's price was $30,000 and that he, White, couldn't pay a commission at that price. Then she claims that she offered to accept $2,000 as her full commission to be paid if White could get Pickering to go above the $30,000 figure and that White agreed to pay commission on that basis (R. 141, 154). She maintains that White told her at that time that he had sold the property to Pickering (R. 156), but on cross-examination it appears that she claims White told her that Pickering had made him an offer of $30,000 which he would be obligated to take if he couldn't get a better offer (R. 157-158) and she never was able to get an offer of even $30,000 (R. 163).

The Whites didn't pay any commission and this action resulted.

The cause was tried February 20, February 21, and February 23, 1950.

After statement of the case on behalf of the respective parties, plaintiff called the defendant, Law-

rence White, as her first witness. White testified that the property was sold May 2, 1949, for $35,000, $6,000 down, the balance to be paid according to the terms of a conditional sales contract held in escrow at the Bank of Alaska (R. 58-59).

At the close of White's testimony, defendants moved for summary judgment on the ground that plaintiff had not replied to affirmative matter contained in the answers and that upon the testimony of plaintiff's witness, Lawrence White, the sale was made on May 2, 1949, after the expiration of the agreement. The motion was denied (R. 13, 59-62).

Carl T. Rentschler, Wendell Dayton, Oliver J. Easley, Rodney L. Johnston and Clara M. Eagleson testified on behalf of plaintiff in addition to Lawrence A. White, as above set forth.

At the close of plaintiff's evidence defendants moved for a directed verdict in their favor and for judgment on the pleadings for defendants and those motions were denied (R. 16, 167).

Defendants called Herbert E. Pickering and Lawrence A. White as witnesses on behalf of defendants.

At the close of all the evidence defendants moved for judgment or for directed verdict for defendants on the ground that plaintiff had failed to prove her case as laid (R. 17, 202). That motion was denied (R. 17).

Each party presented proposed instructions and they are set out in full in the record (R. 19-28).

The matter was argued to the jury and the Court instructed the jury and the respective parties took exception to the Court's action in relation to instructions. The Court's instructions as given are found at pages 28 through 38 and at pages 211 through 221 of the record.

The jury returned its verdict in favor of the plaintiff on February 24, 1950 (R. 39). Judgment following the verdict was entered February 27, 1950 (R. 40-41).

Defendants, on March 6, 1950, filed motion for judgment notwithstanding the verdict and motion for new trial (R. 42-45) and these motions were denied on April 10, 1950 (R. 47). This appeal followed.

III.

SPECIFICATIONS OF ERROR.

Appellants respectfully submit that the trial Court erred as is hereinafter more fully set out and that each of such errors was substantial and that the results of those errors were prejudicial to the defendants, appellants herein, as follows:

1. That the trial Court erred in denying defendants' motion for summary judgment made at the close of the testimony of plaintiff's first witness (R. 13, 59-62) in that, as will appear from the answers of the respective defendants (R. 7-12) such answers contained new matter constituting a defense to plaintiff's alleged cause of action, and in that no reply was filed by the plain-

tiff under the practice then prevailing, and in that it affirmatively appeared from the testimony of such witness that the new matter contained in the answer was true.

2. That the trial Court erred in denying defendants' motions for judgment on the pleadings and for directed verdict for defendants made at the close of plaintiff's case (R. 16, 167) for the reason that, as will appear from the record, plaintiff failed to prove her case, and considering all plaintiff's evidence, there was no substantial evidence in support of a judgment in favor of plaintiff and against defendants.

3. That the trial Court erred in denying defendants' motions for directed verdict for defendants and for judgment made at the close of all of the evidence (R. 17, 202) for the reason that plaintiff failed to prove her case in that upon consideration of all the evidence, including the exhibits, there was no substantial evidence to authorize a verdict in favor of plaintiff and against defendants, and in particular that there was no evidence at all that plaintiff was instrumental in obtaining the buyer, as alleged in plaintiff's complaint (R. 4), and in that there was no evidence at all to justify submitting the matter to the jury as to whether plaintiff was entitled to receive a commission of $3,500 or of any other sum from defendants, or either of them.

4. That the trial Court erred in submitting the matter to the jury at all for the same rea-

sons as are set forth under specifications numbered 1, 2, and 3 above.

5. That the trial Court erred in instructing the jury in Instruction No. IV as follows:

> "You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date." (R. 215).

for the reason that such portion of Instruction IV was prejudicial to defendants, not justified by any issue raised by the pleadings, and was not justified by any evidence introduced in the cause. Defendants excepted to such portion of Instruction IV at the trial as follows:

> "Mr. Renfrew: I wish to make a formal objection to that portion of Instruction No. 4 commencing with line 28 wherein the paragraph starts 'You are also instructed that *if find* the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.' for the reason that:
>
> (1) That is not the law; and
>
> (2) That there is insufficient evidence to warrant such an instruction." (R. 221-222).

6. That the trial Court erred in accepting the verdict of the jury in that such verdict was not justified by any competent evidence and was against the evidence.

7. That the trial Court erred in entering judgment in favor of the plaintiff and against the defendants (R. 40-41) in the amount of the verdict or at all for the reason that plaintiff failed to prove her case, and that under a proper interpretation of the "Authorization to Sell" (Plaintiff's Exhibit 1, R. 66-68) and under the evidence produced in the cause, plaintiff was not entitled to any judgment against defendants, and defendants were entitled to judgment against plaintiff in accordance with their various motions. That if plaintiff should be entitled to any judgment at all against defendants, such judgment should have been limited to the sum of $2,000 according to the offer plaintiff claims was made to defendants by plaintiff and accepted by defendants (R. 141, 154).

8. That the trial Court erred in denying defendants' motion for judgment notwithstanding the verdict (R. 42) for the reasons set forth in such motions and as above set forth in specifications No. 1, 2, 3, 5, 6, and 7 above set forth, and it appearing that defendants moved for judgment and for directed verdict at the close of all the evidence.

9. That the trial Court erred in denying defendants' motion for new trial (R. 43-45) for the

reasons set forth in such motion, and for the reasons more particularly set forth in specifications No. 1, 2, 3, 5, 6, and 7 above set forth.

IV.

SUMMARY OF ARGUMENT.

1. The answers included new matters constituting a defense to plaintiff's complaint. Under the practice then existing, such new matter was deemed admitted unless plaintiff filed a reply. No reply was filed. Under the allegations of the pleadings and from the testimony to the time of the motion for summary judgment, it was apparent plaintiff was not entitled to judgment and defendant's motion for summary judgment should have been granted.

2. Plaintiff by her complaint alleged she was the procuring cause of the sale to Pickering. She failed to prove her case and showed that the sale was made by the owner, unaided by plaintiff. Defendants' motion for judgment and for directed verdict, as made at the close of plaintiff's case, should have been granted.

3. Undisputed evidence introduced on behalf of defendants disclosed that the agreement with Pickering made in April, 1949, was made subject to the right of plaintiff to sell the property prior to April 30, 1949, and the sale was not consummated until after that date. Plaintiff had absolutely nothing to do with the sale. Plaintiff on all the evidence failed to show that she procured the sale or was instrumental

therein. Defendants' motions made at the close of all the evidence should have been granted.

4. Plaintiff attempted to change the theory of the case at the end of the case without asking or receiving an amendment of the pleadings. The new theory was completely outside the scope of the issues as framed and amounted to a material variance and a failure of proof. Judgment based on the substituted theory is unauthorized and should be reversed.

5. Proper interpretation of the "authorization to sell" would deny any commission to plaintiff unless she sold the property or was instrumental in procuring the sale. According to the evidence, she did neither. She shouldn't be entitled to recover under any theory.

6. There is no evidence to support the portion of the Court's Instruction No. 4 excepted to by defendants and set out as Specification of Error No. 5, and the "Authorization to Sell" does not justify the giving of such instruction. The trial Court erred in so instructing the jury.

7. The trial Court should have granted defendants' motion for judgment notwithstanding the verdict on the ground that plaintiff had failed to prove her case, and denial of that motion was error.

8. If it be determined that plaintiff was entitled to any commission, she should have been limited in her recovery to the sum of $2,000 according to the terms of the modified agreement she claims she made with defendant.

V.

ARGUMENT.

Plaintiff in this case by her complaint claimed that she had been employed by defendants to procure a purchaser for the subject business, that the agreement of employment was in effect through April 30, 1949, and that during the months of April, 1949 (March in the original complaint), she was "instrumental in obtaining one John Doe Pinkering to purchase the property," that the property was sold during April for $35,000 ($45,000 in the original complaint), and that she was therefore entitled to a ten per cent commission or $3,500 ($4,500 in the complaint as filed) (Paragraphs II, IV and V Complaint, R. 3-5).

Defendant by answer admitted that plaintiff was employed to secure a purchaser, denied the other allegations, and alleged new matter to the effect that the agreement with plaintiff had expired before the sale, that plaintiff was not instrumental in any manner in interesting the buyer, that the purchase was consummated by direct negotiations between the buyer and the sellers after expiration of plaintiff's employment and without any effort on behalf of the plaintiff (Answer Paragraphs II, IV, V, R. 7-12).

Plaintiff's attorney, in his opening statement to the jury, reiterated the allegations of the complaint to the effect that the sale was made to a buyer which plaintiff was instrumental in selling and that therefore plaintiff was entitled to her commission (R. 54-56).

Alaskan law, at the time the pleadings were executed and filed, authorized a defendant to move for judgment on the pleadings where the answer contained new matter constituting a defense and where no reply to such new matter was filed.

> 55-5-61. *Reply: When Permitted.* When the answer contains new matter, constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer. New matter constituting a "defense" as used herein, shall be deemed to include what at common law were known as matters in abatement.[1]
>
> 55-5-18. *Admission by failure to deny.* Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of the action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the adverse party as upon a direct denial or the avoidance, as the case may require.

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[1]Alaska Compiled Laws Annotated, herein designated as A.C.L.A., 1949, were not actually published until late in 1949 but the applicable laws so far as here material were the same as the laws contained in the 1933 compilation as amended to 1947. For convenience, they have been cited under the A.C.L.A., 1949, numbering system.

> 55-5-63. *Motion by defendant for judgment on pleadings: Assessment of damages.* If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages.

By court rule plaintiffs were required to reply, demur, or otherwise move against an answer within five days after its filing or service unless additional time was given by the Court (Rule 15, Uniform Rules of the District Court for the Territory of Alaska, effective March 7, 1947, page 14). No additional time was given here.

Answers were served and filed in this case on June 16, 1949. On July 16, 1949, the Federal Rules of Civil Procedure were extended to the District Courts of Alaska and the courts have held that those rules, since that date, govern procedure in such courts in cases of local jurisdiction as well as those of Federal jurisdiction.

Plaintiff called defendant Lawrence White as her first witness. So far as here material he testified that on May 2, 1949, he sold the subject business to Mr. Pickering (R. 59).

Defendants then moved for summary judgment on the ground that no reply had been filed to the new matter constituting a defense contained in the an-

swers, and that by the testimony of plaintiff's own witness, it affirmatively appeared that the new matter contained in the answer was true and that the sale was made by defendants after the expiration of the listing (R. 59-62) and not by the efforts of plaintiff. The Court denied the motion on the specific ground that under the Federal Rules of Civil Procedure a reply is unnecessary unless a counterclaim is filed (R. 62-63).

While the Court was correct as to the content of the rules, he completely overlooked the fact that the rules were not applicable when the pleadings were closed, and under the practice then existing the new matter constituting a defense was not deemed denied but on the contrary stood admitted unless a reply was filed as provided by rule. Thus at the time the motion was made it stood admitted that the sale was made by defendants after April 30, 1949, and without any aid or assistance from plaintiff. In addition the undisputed proof at that time was that defendants had made the sale on May 2, 1949, and that plaintiff had not procured the sale. We believe that on the pleadings and upon the proof, defendants were entitled to summary judgment and that the trial Court committed prejudicial and reversible error in denying the motion.

Plaintiff continued to try her case. She offered no proof at all that she had procured Pickering to purchase the property. On the contrary, she attempted to show by various witnesses that defendants sold the property. All of her witnesses admitted that they didn't know Pickering and that they never had any

contact with him and that Pickering was first called to their attention by defendant Lawrence White. They testified that White asked them to bring in prospects to try to stimulate Pickering's interest and that they did bring in one prospect. However, this prospect made no offer for the property at all and there isn't a shred of evidence that this procedure had any influence at all upon Pickering or upon the ultimate sale. Neither is there any evidence that plaintiff procured the purchaser or was instrumental in any way in promoting the sale.

We intend to discuss the "Authorization to Sell" at greater length at a later point in this brief, but at this point we want to call the Court's attention to that portion which provides for the commission:

> "In consideration of the services of said agent *in making such sale, transfer, sending me a buyer, advertising or being instrumental in any manner whatever in selling or transferring said property,* I agree to pay said agent out of first payment a commission due on total sale price of ten per cent (10%),". (Emphasis supplied).

We believe that a fair reading of the language just quoted would require plaintiff in some manner to be instrumental in selling the property before she would be entitled to collect a commission. She did not make the sale, she didn't send a buyer, there is no evidence that anything she did was instrumental in any way at all in bringing about the sale.

"Procuring a sale" presupposes that the broker first introduce the parties or in some way do some-

thing to bring about the sale. Before she is entitled to recover anything, plaintiff must prove that she has performed her part of the bargain. In this case, whether one consider the authorization or the complaint, plaintiff wasn't to be paid unless a sale was made and unless she procured the sale to be made, or at least did something instrumental toward making the sale.

> "To entitle a broker to his commissions, he must accomplish what he undertook to do in his contract of employment, for, as a rule, nothing short of that is sufficient to constitute a performance upon his part. He is never entitled to compensation for unsuccessful efforts. In every case reference must be had to the terms of that particular employment in order to determine whether or not a broker's duties have been performed. A real estate broker properly authorized to sell property may be said to have performed his contract and to be entitled to commissions when he has, in pursuance of his employment and within the time specified therein, procured a purchaser ready, able, and willing to purchase the property on the terms and conditions specified in the contract of employment, unless the principal in the course of the negotiations finds it acceptable to make certain modifications in his original terms and contract with the party produced upon that altered basis." (8 Am. Jur., Sec. 168, Brokers, p. 1084). See cases there cited and especially *Crowe v. Trickey,* 204 U.S. 228.

> "In the absence of a special contract, a broker must be the procuring cause of a sale or transaction in order to be entitled to commissions thereon. Whether the broker is to introduce a

customer or to find or procure one, or whether he is to do these things combined, his duties remain practically the same, as these words are generally used synonymously in the making of such contracts." (8 Am. Jur., Sec. 172, Brokers, pp. 1087, 1088).

"Where a broker instead of procuring a person who is ready, able, and willing to accept the terms his principal authorized him to offer at the time of his employment, procures one who makes a counter offer more or less at variance with that of his employer, the latter is at liberty either to accept the proposed party upon the altered terms or to decline to do so. If he accepts he is legally obligated to compensate the broker for the services rendered, but if he refuses he incurs no liability therefor. In other words if the principal does not see fit to modify his original proposals the broker can lay no claim to his commissions until he produces a person who is ready, able, and willing to accept the exact terms of his principal." (8 Am. Jur., Sec. 176, Brokers, p. 1092).

"The general rule is that if property is merely placed in the broker's hands for sale, or the broker is given a mere right to sell, the owner himself may make a sale without liability to the broker for commissions, provided the broker has not done the work required to earn his commission, and the owner's sale does not directly interfere with his efforts." (8 Am. Jur., Sec. 189, Brokers, p. 1100).

At the close of plaintiff's evidence and in the light of her pleadings, plaintiff had completely failed to prove her case. There wasn't a shred of evidence that

"she was instrumental in obtaining one John Doe Pinkering," or anyone else "to purchase the property." On the contrary, all of her evidence disclosed that in nearly ten months' time she had not secured even one offer for the property at any price. We believe that giving the evidence every intendment in favor of the plaintiff that plaintiff entirely failed to show she was entitled to any commission and that defendants were entitled to directed verdict or to judgment according to motions made at the close of plaintiff's case (R. 17, 167). We believe the trial Court committed prejudicial and reversible error in denying such motions.

At the close of all the evidence, plaintiff had still failed to prove her case as laid. Even at that time there was no evidence that plaintiff had in any way procured the purchaser or had been instrumental in any way in bringing about the sale. On the contrary, at that time, by undisputed evidence, it appeared that the buyer first became acquainted with the business and that he first learned the business was for sale while working there and that he had no contact with plaintiff and wanted none. Plaintiff's bringing in a prospect hadn't influenced his desire to buy. On the contrary, he had already decided to try to buy, and in fact had come to terms with defendant subject to raising the money and subject to the agency's rights prior to the time the prospect was brought in.[2] While

[2]Easter was on April 17 and the buyer was making candy for Easter when the prospect was brought in (R. 170). The buyer agreed upon price and terms with the sellers shortly after the first of April (R. 173).

White and Pickering had agreed on price and terms, the sale was specifically agreed to be subject to Pickering's raising the down payment and subject to the agency agreement which the parties believed expired on April 30. The money wasn't available until May 1 and the sale was made at that time.

At the close of all the evidence there was not a shred of proof that plaintiff had procured a purchaser or that she was instrumental in any way in selling the property. She still had failed to prove by any evidence at all that she was entitled to a commission. We believe that defendants were entitled to a directed verdict or judgment according to their motions made at the close of all the evidence (R. 17, 202) and that the trial Court committed prejudicial and reversible error in denying such motions.

At the close of the trial, plaintiff abandoned her theory of the case that she had procured the purchaser, as pleaded in her complaint, and changed her theory to claim that the "authorization to sell" gave plaintiff an "exclusive agency" and that she was entitled to recover her commission even though defendants made the sale without her aid and even though plaintiff did not procure the sale and was not instrumental therein. Plaintiff at that time contended that the main issue before the Court was as to whether the sale to Pickering was made before or after April 30, 1949, and as to whether defendants acted in good faith in deferring the sale until after April 30.

This change of theory is apparent from a reading of plaintiff's requested instructions (R. 19-22). It is

interesting to note that no such requested instructions mention "procuring of a sale" or efforts expended by plaintiff which were instrumental in consummating the sale. On the contrary, requested instruction No. III specifically states as follows:

> "In the present case there is no evidence that plaintiff or her representative, Rentschler, ever dealt with the ultimate buyer, Pickering, during the life of the agreement."

It is apparent that plaintiff realized at the close of the evidence that she had not proved her case as laid and shifted her theory to try to make recovery of her claimed commission. As previously noted, plaintiff neither requested nor was she granted the right to amend her complaint except as to date of sale and as to amount of sale and plaintiff's claim.

We believe that plaintiff, if plaintiff is entitled to recover in this case at all, must recover on the theory outlined by the pleadings and upon which the case was tried, and that she is not entitled to recover on a theory outside the scope of the pleadings, pulled out of the hat, as it were, at the last minute, after she had completely failed to prove her case as made.

The laws of Alaska provide that issues of fact arise from the pleadings.

> "An issue of fact arises—
>
> First. Upon a material allegation in the complaint controverted by the answer; or,
>
> Second. Upon new matter in the answer controverted by the reply; or

> Third. Upon new matter in the reply, except an issue of law is joined thereon." (ACLA 1949, 55-7-3).

and as to failure of proof provide

> "When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof." (ACLA 1949, 55-5-73).

Apparently neither of these sections are supplanted by the Federal Rules of Civil Procedure, except insofar as a reply may not be required.

By general law, plaintiff is precluded from recovering judgment unless she has proved her case within the issues defined by the pleadings.

> "The plaintiff in his proof must ordinarily be confined to the cause of action set forth in his declaration or complaint, and must recover, if at all, on the case made thereon. Except for authority given by statute to the court to cure variances by directing an amendment of the pleading to conform to the proof, the code system of pleading and other practice provisions do not, as a rule, affect the principle that the allegations and proof must correspond. Under modern practice, as well as at common law, a plaintiff cannot sue on one cause of action and recover on another. Any other rule would lead to interminable surprises and consequent injustice. This rule has reference not to the form of the action, but to its substance." (41 Am. Jur., Pleading, Sec. 374, p. 550).

"Decrees in equity and judgments at law must have a basis in the pleadings and the evidence. A party's proof cannot materially vary from his allegations, and the verdict and judgment must respond to the issues as raised by the pleadings. The parties should be confined in their recovery to that to which they are entitled within their allegations. It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover. This seems to be a principle necessary to the due administration of justice in the courts, and its observance is necessary in order to give the judgment the merit of finality of an adjudication between the parties. A judgment upon a matter outside of the issues raised by the pleadings must, of necessity, be altogether arbitrary and unjust, as it attempts to conclude a point upon which the parties have not been heard." (41 Am. Jur., Pleading, Sec. 381, pp. 555, 556).

"A material variance arises where a party pleads one cause of action or defense and attempts to prove another and different one. It follows that a party must recover, if at all, on the case made by his pleadings, as modified and amplified by his bill of particulars if one is filed. There can be no recovery upon a cause of action however meritorious it may be, or how satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff, unless an amendment might be made to conform the pleading to the proof of the new cause of action." (41 Am. Jur., Pleading, Sec. 382, pp. 556, 557).

As we have previously pointed out, we believe that plaintiff wholly failed to prove her case as laid, and

that defendants' motions made at the close of the case should have been granted, and that to submit the matter to the jury on some theory not within the issues made by the pleadings was prejudicial and reversible error.

As above set out, defendant does not admit that the question as to whether plaintiff was entitled to recover on a theory of "exclusive agency" without "procuring the sale" was properly before the trial Court or is before this Court on the issues made by the pleadings. However, without waiving its arguments above made, and in order that defendants' contention on that theory may be before the Court, if the Court should hold we are in error, we respectfully submit that plaintiff is not entitled to recover anything from defendants even on that theory.

The "authorization to sell" (R. 66-68) is an interesting document. Parts of it are absolutely inconsistent with other parts. It seems apparent that plaintiff's agent, Rentschler, in preparing the document must have thrown in something from each of the listing or agency agreements he ever saw with the idea in mind that one of them would be bound to catch the owner.

However, we believe that a fair reading of the entire document, in the light of the law as to interpretation of documents, will show that at best the plaintiff had an exclusive listing, good for sixty days, under which plaintiff would only be entitled to a commission on proof that she procured the purchaser, or at best on proof that she was instrumental in some manner

in making the sale. She would also have been entitled to a commission upon proof that a sale was made by the owner within 60 days after expiration of the agreement to a purchaser "with whom the agent negotiated during the time of the authorization to sell." The authorization is called an "authorization to sell," (confidential listing). In its first paragraph it purports to give the plaintiff "the exclusive sale or transfer of real estate." It is conceded that the property in question was not real estate. In fact, the listing itself shows that the business was conducted on leased property. No consideration is expressed for "the exclusive sale" and no consideration was attempted to be proved in that connection.

Several lines farther down the authorization appoints Clara Eagleson as "my lawful agent."

The next to last paragraph reads as follows:

> "I hereby *list said property exclusively with said agent* for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom said agent negotiated during the time of the Authorization to Sell." (Emphasis supplied.)

The commission clause reads as follows:

> "In consideration of the services of said agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of

10% of $45,000 payable at the office of the said agent."

This clause is the only place in the authorization purporting to be supported by consideration. As previously pointed out, this clause limits the payment of commission to cases where plaintiff was instrumental in making the sale.

Nor does the clause which reads:

"Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property."

alter the matter or give plaintiff the right to collect a commission if she doesn't sell the property or create an exclusive right to sell the property in the plaintiff. Since plaintiff is to receive her commission only "in consideration of *services of the agent* in *making such sale,* transfer, *sending me a buyer, advertising, or being instrumental in any manner whatsoever in selling or transferring said property,*" it follows as a matter of course that where she rendered no services in those respects and did not sell the property and was not instrumental in the sale, that she would not be entitled to any commission where the sale was admittedly made by defendants, and where plaintiff has not proved she was instrumental in any manner in making the sale.

If, as we believe, plaintiff was only entitled to a commission upon proof that she made the sale or

was instrumental therein, it would seem to follow that the language "shall work no forfeiture in the commission due said agent in sale or transfer of said property," doesn't tend to show "an exclusive right to sell' in the plaintiff. On the contrary, since plaintiff would only be entitled to a commission upon a sale made by her or in which she assisted, there could be no "forfeiture" of such commission upon a sale by the owner as there would be no commission due in that case.

We submit that in order to properly construe the "authorization" as a whole, and without doing violence to the language, the language

> "Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property"

should be construed with the language concerning a sale of the property by the owner within sixty days after expiration of the agreement "to parties with whom the agent negotiated during the time of the authorization to sell."

This "authorization" should be construed as a whole, and in a reasonable manner. Any doubt as to the broker's powers under the "authorization" should be construed against her.

> "The general principles of law governing the construction of contracts generally are applicable to the construction of a broker's contract of employment. Such a contract should be construed as a

whole, and in a reasonable manner. Any doubt, however, as to the broker's powers thereunder should be resolved against him." (8 Am. Jur., Brokers, Sec. 18, p. 999).

The "authorization" is the work of plaintiff and if its meaning is in doubt it should be construed against her.

"An agreement should be interpreted as a whole and the meaning gathered from the entire context, and not from particular words, phrases, or clauses. In fact the entire agreement is to be considered to determine the meaning of each part. All provisions should, if possible, be so interpreted as to harmonize with each other." (12 Am. Jur., Sec. 241, pp. 772, 773).

"Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it. Sometimes the rule is stated to be that where doubt exists as to the interpretation of an instrument prepared by one party thereto, upon the faith of which the other has incurred an obligation, that interpretation will be adopted which will be favorable to the latter. It is said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist." (12 Am. Jur., Sec. 252, p. 795).

It is sometimes said that a person has an inherent right to dispose of his own property and that agreements with brokers in doubtful cases should be con-

strued against any exclusive agency or exclusive right to sell in the broker.

The Court, over the exception of defendants, gave a portion of Instruction No. 4, more particularly set out in defendants' Specification of Errors No. 5. That portion of such instruction assumes plaintiff would be entitled to a commission upon a sale made within sixty days after April 30 if plaintiff would have negotiated with Pickering but for the acts of defendants. The authorization does not justify such instruction. The commission was to be paid upon a sale made after April 30 by the owner only if it was made to parties with whom the agent negotiated during the time of the authorization to sell. Plaintiff never at any time negotiated with Pickering. She could have contacted him at any time. She claims that White said Pickering was allergic to real estate agents or had an aversion to them and that she should not talk with him. This is emphatically denied by White. In any event, and whatever the reason, plaintiff made no effort at all to contact Pickering. She apparently preferred to sit back and do nothing. If White didn't sell the property, she was out nothing. If he did, she would come in and claim the commission she had failed to earn in ten months' time.

This authorization didn't bind plaintiff to do anything. She could work upon the sale or not as she saw fit. She admitted upon her testimony that any expenses incurred or work done were expenses of doing business and that she was entitled to a commission only if she made the sale (R. 147).

There was no concealment here by defendants. Plaintiff knew White was dealing with Pickering. She even claims she knew what offer had been made. She didn't sell the property, she never received an offer, she never tried to contact Pickering. She didn't earn any commission even under her belated theory of the case.

Suppose, for the purpose of argument, that the authorization created an exclusive agency with the effect claimed by plaintiff. Can it be said to follow that the extension granted by Lawrence White revived the exclusive agency several months dead? We believe not. No consideration was given. Plaintiff already had the prospects. She represented that she thought she could sell the property if given another three weeks. Defendants were willing to let her sell if she could. The undisputed evidence is that negotiations with Pickering during April were specifically contingent upon plaintiff's right to sell the property if she could. She didn't. She didn't even get an offer at any price. To allow her a commission in any amount would be to pay her for performing an agreement she didn't perform and would be a gross injustice to defendants.

Rule 50 of the Federal Rules of Civil Procedure, subsection (b) provides as follows:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised

by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Defendants moved for judgment notwithstanding the verdict under that rule (R. 42-43). We believe that we have shown that plaintiff failed to prove her case and that this motion should have been granted. We believe its denial was prejudicial and reversible error. There was and is no evidence before the Court authorizing a judgment for plaintiffs and against defendants.

Defendants believe one other matter is worthy of consideration. Plaintiff in her testimony contended that the parties reached a new agreement as to commissions, based on a sale to Pickering at a figure above $30,000. She claims she offered to accept $2,000 as full settlement of her commission if White could

get Pickering to pay more than $30,000 and that White accepted the proposition and promised to pay on that basis (R. 141, 154). We believe we have demonstrated that under the evidence and under the issues framed by the pleadings plaintiff earned no commission and is not entitled to anything, but if we are held to be wrong, we believe plaintiff's recovery should be limited to the $2,000 she claims she was to get under the modified agreement.

Dated, Anchorage, Alaska,
March 30, 1951.

Respectfully submitted,
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